APPEAL NO. 92144

On January 31, 1992, a contested case hearing was convened in _____, Texas, with (hearing officer) presiding. Shortly after respondent began to testify, the hearing officer, on her own initiative but with the agreement of the parties, continued the hearing in order to obtain a translator. Upon reconvening on March 12, 1992, the hearing officer heard the testimony of respondent, considered the similar sworn statements of three supervisory personnel from (Employer), and decided in respondent's favor the two disputed issues, to wit: whether he sustained a back injury in the course and scope of his employment on (date of injury), and whether he timely notified Employer of his injury. Appellant challenges the sufficiency of the evidence to support the hearing officer's conclusions on the two disputed issues. Appellant also raises on appeal issues concerning the hearing officer's receiving hearsay testimony from respondent and arbitrarily assigning more weight to respondent's testimony than to the written statements of appellant's witnesses.

DECISION

Finding the evidence sufficient to support the decision of the hearing officer and finding no reversible error, we affirm.

Respondent testified that he came to the United States from (Country) in 1986 and commenced work for Employer on May 25, 1990. In August 1990 he experienced his first work related injury when he stepped on a fork and hurt his foot. On (date of injury), while working in the liquor department sorting soft drink beverages for outbound flights, respondent testified he hurt his back when turning around to arrange a tray of soda cans on a pallet. He said he felt a sharp pain which hurt him to such an extent he could only take the drink can trays from the incoming conveyor belt to the outgoing belt without being able to reorganize the trays as he was supposed to do. He finished his shift because he was the main provider and was afraid he would lose his job if he stopped working. According to respondent, he told his immediate supervisor, Ms. D, the same day about his back injury. He said he told her he was in sharp pain and may have broken his back but she appeared to believe respondent was just joking. He said he didn't go to Employer's nurse because he didn't know where the nurses station was located. Respondent didn't think the injury was serious and went to an "outside doctor" on his health insurance. He treated himself by wearing a belt to hold his back straight and by taking various medications. Respondent also testified that several coworkers knew of his injury but were afraid to testify for fear of losing their jobs. Appellant's objections to that testimony were twice sustained, however. Respondent testified to still another job related injury to his elbow which occurred in November 1991.

Respondent testified, over objection, that after the first session of the contested case hearing he spoke with Ms. D in the hallway and asked her what she was going to say to the hearing officer about respondent's injury. According to respondent, Ms. D replied she would testify that she heard respondent tell her he had hurt his back.

Appellant introduced a sworn, written statement from Ms. D in which she stated that respondent "never reported any on the job injury to me and I had no knowledge that an injury or accident occurred involving [respondent]." The statement of Mr. G said that he was the day shift supervisor (respondent worked from 3:30 p.m. to 12:00 a.m.) and that neither respondent nor Ms. D, who was respondent's "direct lead supervisor," reported "an injury" to him. The statement of Mr. V indicated he wasn't respondent's supervisor on (date of injury), didn't know respondent, and had no knowledge of a report of an injury or accident. Appellant also introduced a progress note from Employer's health center which indicated respondent's right foot was then asymptomatic and that respondent could return to regular duty. This note was dated "1-9-91," the day after respondent's back injury. Respondent testified in rebuttal that the date of the progress note was erroneous.

The Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. article 8308-6.34(e) (Vernon Supp. 1992) (1989 Act), provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility it is to be given. We cannot agree with appellant's assertions that there was insufficient evidence to support the hearing officer's findings that respondent sustained an injury to his back while loading soda cans on (date of injury), in the course and scope of his employment, and timely notified Ms. D on that date of his injury. "Evidence is factually insufficient if it is so uncertain, inconsistent, improbable, or unbelievable that, although constituting some evidence of probative force when considered in its most favorable light in support of the findings, it would, nevertheless, be clearly unjust to permit the judgment to stand." Lopez v. Hernandez, 595 S.W.2d 180, 183 (Tex. Civ. App.-Corpus Christi 1980, no writ). The hearing officer obviously chose to believe respondent's testimony, including his responses to questions upon cross-examination by appellant. When reviewing a hearing officer's findings for factual sufficiency of the evidence, we consider and weigh all the evidence and do not disturb such findings unless they are so contrary to the overwhelming weight of the evidence as to be wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We recognize it is the function of the hearing officer, as the fact finder, to judge the credibility of witnesses and to assign weight to and resolve conflicts and inconsistencies in the evidence. We will not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by some probative evidence and are not so against the great weight and preponderance of the evidence as to be manifestly unjust, shock the conscience, or clearly demonstrate bias. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

In its third issue appellant asserts that the hearing officer erred in admitting appellant's hearsay testimony concerning what Ms. D would have testified to had she been present at the hearing. Apparently Ms. D had been present for testimony at the initial session, and during the continuance was involved in an auto accident. She was not present when the hearing resumed. Respondent testified over objection that after the previous session of the hearing he spoke with Ms. D out in the hall and asked her "What will you say to the judge about my injury?" to which she replied that "I will tell the Judge that I heard your

(sic) tell me you get hurt in the back." Appellant states that while it recognizes that conformity to the legal rules of evidence is not required in contested case hearings "the line must be drawn somewhere;" respondent didn't depose or subpoena Ms. D; and appellant "has the right to know whether in this and future proceedings the Claimant (an interested party) can attempt impeachment of a witness not in attendance by simply testifying to alleged out-of-court assertions of the witness contrary to the sworn statement of the witness." As appellant has recognized, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.2(8) (TWCC Rules) authorizes the hearing officer to rule on the admissibility of evidence. While Article 8308-6.34(e) provides that conformity to the legal rules of evidence is not required in a contested case hearing, we do not understand such provision as tantamount to carte blanche authorization for a hearing officer to admit all hearsay evidence, no matter how egregious. We have previously noted that "[a]lthough not binding at a contested case hearing, the Texas Rules of Civil Evidence offer valuable guidance on evidentiary matters that might be appropriately considered in admitting evidence." Texas Workers' Compensation Commission Appeal No. 91065 (Docket No. FW-001-6-91-CC-2) decided December 16, 1991. The testimony in question may not have amounted to hearsay unless Ms. D's out of hearing declaration was offered in evidence to prove the truth of the matter asserted. Tex. R. Civ. Evid. 801(d). Ms. D's sworn written statement introduced by appellant was to the effect that respondent didn't notify her of "any injury." Ms. D's prior out of hearing declaration, if made, was inconsistent with her written statement and may have been offered for impeachment purposes by respondent.

Our reading of the record does not persuade us that, even if the questioned testimony were inadmissible hearsay, prejudicial error resulted from its admission. To obtain a reversal based upon error in the hearing officer's admission of evidence, appellant must show the decision to admit the evidence was error, and that such error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 91021 (Docket No. FW-00011-91-CC-1) decided September 25, 1991; Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182, 185 (Tex. Civ. App.-San Antonio 1983, writ ref'd n.r.e.). "Reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. (Citations omitted.)" Roy E. Thomas Construction Company v. Arbs, 692 S.W.2d 926, 936-937 (Tex. App.-Fort Worth 1985) writ ref'd n.r.e., 700 S.W.2d 919 (Tex. 1985). *Instanter*, the whole case did not turn on the out of hearing declaration of Ms. D, even assuming it was made. We note the statement wasn't alluded to in the hearing officer's recital of the evidence. The hearing officer was free to believe respondent's testimony that he did notify Ms. D of his back injury on the day of the injury. It was up to the hearing officer to resolve the conflict in the evidence created by respondent's testimony and the three written statements of supervisory personnel submitted by appellant. We do not find from reviewing the entire record that appellant has shown that the hearing officer's error, if any, in permitting the hearsay testimony was prejudicially harmful.

In its fourth appealed issue appellant asserts "[t]he hearing officer erred in arbitrarily

assigning more weight to live testimony versus a sworn statement." This issue had its genesis in an exchange between the parties and the hearing officer at the outset of the March 12th session. Respondent objected to the absence of Ms. D contending he needed her present for effective cross-examination since resolution of the disputed issues came down to respondent's word against that of Ms. D. Appellant indicated Ms. D had been in an auto accident after the first hearing, was at home and had been so for two weeks, and that appellant didn't know her present condition. After some discussion of the possibility of examining Ms. D by telephone, respondent requested a continuance "to protect the claimants' case." Appellant objected noting that statements from the employer's witnesses had previously been exchanged and that appellant was experiencing problems with the attendance of its witnesses because of the change in the hearing date. The hearing officer then denied respondent's request for a continuance and in so doing made the following comments: "I'm also denying the request due to the fact that I believe the testimony that will be elicited or given today, I will be the sole judge, as I explained, as far as the evidence that is presented, I will weigh it and assign the appropriate weight to be given it. With regard to Ms. D, since she's not able to appear, of course, you may submit any statement that you wish. Of course, I will assign more weight to firsthand testimony that is available to be presented as opposed to any statements that may be presented. So I kind of think that addresses that issue as far as what you have raised and that is my ruling." (Emphasis supplied.) Appellant contends the hearing officer's statement that she would assign more weight to testimony than to statements constituted a prejudging of the evidence and could have a chilling effect on the use of sworn statements and summary procedures in contested case hearings. Article 8308-6.34(a)(5) requires the hearing officer to allow the presentation of evidence by affidavit; Article 8308-6.34(e) authorizes the hearing officer to accept written statements signed by a witness; and Article 8308-6.34(b) authorizes the hearing officer to permit the use of summary procedures including witness statements. *And see* TWCC Rules 142.2 and 142.8. We have previously observed that "affidavits and statements are fully acceptable methods for bringing evidentiary matters before the contested case hearing." Texas Workers' Compensation Commission Appeal No. 92069 (Docket No. DA-A-137287-01-CC-DA41) decided April 1, 1992. We certainly do not approve the hearing officer's regrettable comment. Evidence cannot and should not be weighed by a hearing officer before it is even admitted and its content reviewed. The hearing officer's comment was made before she heard all of the testimony of respondent and before she received appellant's sworn statements. There are obvious differences in evidence presented through a witness' testimony and through a written statement. A witness' demeanor can be observed and a witness is subject to cross-examination. Such obvious differences can, of course, cut both ways and a written statement may well impress a hearing officer as more credible than the testimony of a witness. To the extent that the hearing officer's comments could be viewed as improper comment on the weight of the evidence, albeit she was the fact finder, we note that no objection was made by appellant at the time so as to give the hearing officer the opportunity to correct her comment. Objections to improper conduct or comment generally must be made at the time of the occurrence to avoid waiver. Brazos River Authority v. Berry, 457 S.W.2d 79, 80 (Tex. Civ. App.-Tyler 1970, writ ref'd. n.r.e.). Even if the comment was error and not waived, we are persuaded from our examination of

the entire record that such error probably did not cause the rendition of an improper decision by the hearing officer. Brazos River Authority v. Berry, *supra* at 81. The written statement of Ms. D was imprecise at the least in stating that respondent "never reported any on the job injury to me and I had no knowledge that an injury or accident occurred involving [respondent]" in view of respondent's testimony that he had sustained three job related injuries (by the date of Ms. D's statement). The hearing officer is vested by Article 8308-6.34(e) with sole authority to judge the weight and credibility to be given the evidence. We may not substitute our judgment for that of the hearing officer where, as here, the findings are supported by some evidence of probative value and are not against the great weight and preponderance of the evidence. Texas Employers' Insurance Ass'n v. Courtney, 709 S.W.2d 382, 384 (Tex. App.-El Paso 1986, writ ref'd n.r.e.).

Affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge